United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,442

OSCAR L. ALTMAN, ET AL., *Appellees*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Appellant*

Appeal From the United States District Court for the District of Columbia

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

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Relevant Docket Entries

DATE PROCEEDINGS

March 5, 1965—Complaint filed

• • •

Nov. 10, 1966—Answer filed

• • •

Nov. 29, 1968—Motion of Plaintiffs for Summary Judgment

• • •

May 29, 1969—Order Denying Plaintiff's Motion For Summary Judgment

• • •

June 19, 1969—Order Denying Motion By Plaintiffs To Modify Order Denying Summary Judgment

June 30, 1969—Notice Of Appeal By Plaintiffs From Orders Of May 29, 1969, and June 19, 1969

• • •

Nov. 12, 1969—Order Granting Appellee's Motion To Dismiss Appeal

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Dec. 10, 1969—Defendant's Motion To Stay Action

• • •

March 4, 1970—Hearing On Motion To Stay Action

March 19, 1970—Order Denying Motion To Stay Action And Certifying Matter To Court Of Appeals Pursuant to 28 U.S.C. § 1292(b)

• • •

June 12, 1970—Order Granting Appeal

Complaint, Filed March 5, 1965

COMPLAINT FOR EQUITABLE RELIEF CONCERNING REFUSAL TO DECLARE DIVIDENDS ON PREFERRED STOCK

1. This Court has jurisdiction under Title 11, Section 521, *et. seq.* of the District of Columbia Code. Plaintiffs are citizens of the District of Columbia and State of New Jersey, respectively. Defendant Central of Georgia Railway Company (hereinafter usually referred to as "Central") is a corporation organized on October 7, 1895, under the laws of the State of Georgia, maintains an office in the District of Columbia and does business in the District of Columbia. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

2. Defendant D. W. Brosnan is the Chairman of the Board of Directors of Central and member of the Executive Committee of said Board of Directors. Defendant Brosnan is President of Southern Railway Company (hereinafter usually referred to as "Southern"), a corporation organized under the laws of Virginia, with its principal place of business in Washington, D.C. Southern owns 96.22 per cent of the stock of Central. Defendant Brosnan is a citizen of Washington, D.C. and maintains a place of business in said District of Columbia.

3. Defendant E. M. Tolleson is a member of the Board of Directors of Central and a member of the Executive Committee of said Board. Defendant Tolleson is Executive Vice President of Southern. Defendant Tolleson is a citizen of the District of Columbia and maintains a place of business in said District of Columbia.

4. Defendants James M. Barry, Earle F. Bidez, Frank E. Bone, Erle Cocke, Sr., William E. Dillard, Robert W. Groves, Charles C. Hertwig, Julian T. Hightower, Thomas M. Johnson, John J. McDonough, John B. Miller, Harrell

L. Perkins, Walter C. Scott, Hugh M. Tarbutton, Martin L. Tressel, D. Abbott Turner and S.S. Wilbanks are members of the Board of Directors of Central (the named persons collectively are hereinafter sometimes referred to as the Board of Directors of Central or the "Board").

5. Plaintiff Oscar L. Altman is a citizen and resident of the District of Columbia and is the owner of one hundred shares of Central preferred stock, of a par value of $100 per share, which shares were all acquired on or before February 1961.

6. Plaintiff Victor A. Altman is a resident of the District of Columbia and is the owner of one hundred shares of Central preferred stock, of a par value of $100 per share, which shares were all acquired on or before September, 1962.

II.

7. Plaintiffs bring this suit on behalf of themselves and all other stockholders of Central preferred stock similarly situated.

8. Under the terms of Central's Charter, as amended, the holders of Central preferred stock are entitled to receive dividends at the rate of five per cent per annum of the par value of said stock (or $5.00 per annum) out of and to the extent of Available Net Income. Preferred dividends are cumulative, provided, however, that accumulated unpaid dividends shall not exceed fifteen (15%) per cent of the par value of the preferred shares, or $15.00 per share. The definition of Available Net Income and other pertinent provisions of Central's Charter are set forth in Appendix A, attached hereto and by reference made a part hereof.

9. During the years 1960, 1961, 1962 and 1963, there were issued and outstanding over 170,000 shares of Cen-

tral preferred stock, of a par value of $100 per share. The five (5%) per cent per annum dividend which would have been payable on said preferred shares equals $5 per share per annum, and the total preferred stock dividend payable per annum is in excess of $850,000 per annum. The total amount of preferred stock dividends attributable to these four years is in the amount of $20 per share.

10. Central has not paid any dividends on its preferred stock for the years 1960, 1961, 1962 and 1963. The total amount of dividends in controversy is in excess of $3,400,000.

11. Request was made in September, 1963 for the payment of dividends on the Central preferred stock, and Defendant Dillard, President of Central and a member of its Board of Directors, wrote that Central did not intend to pay dividends in the immediate future. Request was made of Central's Board of Directors for payment of dividends on Central's preferred stock, and Defendant Brosnan, Chairman of Central's Board of Directors, wrote in October, 1963 that said Board had considered the matter and had declined to declare any dividends on the preferred stock. No dividends have been declared or paid on Central preferred stock in 1964, up to the date of the filing of this Complaint.

12. The accumulated unpaid dividends on said preferred stock total fifteen (15%) per cent, for the years 1960, 1961, and 1962, or a total of fifteen dollars ($15) per share. The five (5%) per cent dividend on the preferred stock of Central will not accumulate for the year 1963 if no dividends are paid for the prior years, 1960, 1961 and 1962. Since there is no provision in Central's Charter for interest on unpaid dividends, plaintiffs have suffered irreparable damage from the failure to pay promptly said dividends for the years 1960, 1961 and 1962. Plaintiffs will suffer fur-

ther irreparable damage if the dividends for the year 1963 and for subsequent years are not paid since there is no provision in Central's Charter for accumulation of dividends beyond three years.

13. During each of the years 1960, 1961, 1962 and 1963, Central had at all times sufficient Available Net Income to pay the preferred dividends of five (5%) per cent for each year. Its Earned Surplus (Retained Income Unappropriated) represents accumulated Available Net Income which can legally be used to pay preferred dividends and, at all times during these years, it exceeded $16,000,000.

14. Central owns profitable subsidiary companies and Central's net income, consolidated with that of its subsidiary companies, averaged in excess of $400,000 per annum more than Central's unconsolidated net income. Central's Annual Report for 1963 reported that Central's equity in the earnings of these subsidiary companies equalled $1,055,000 and $1,156,000 for 1963 and 1962 respectively. On a consolidated basis, Central's Earned Surplus (Retained Income Unappropriated) at all times during these years exceeded $27,000,000.

15. Central had liquid assets during the years 1960, 1961, 1962 and 1963 sufficient to pay the full preferred dividends each year without borrowing. The amounts of cash and temporary cash investments of Central during this period are shown as follows:

Date	Cash	Temporary Cash Investments	Total
December 31, 1963	$1,897,274	$4,007,849	$5,905,123
December 31, 1962	$2,571,192	$4,729,815	$7,301,007
December 31, 1961	$3,143,761	$3,628,007	$6,771,768
December 31, 1960	$2,335,775	$4,029,210	$6,364,985

Central's current assets and current liabilities were as follows:

Date	Current Assets	Current Liabilities	Excess of Current Assets over Current Liabilities
December 31, 1963	$14,050,471	$7,815,435	$6,235,036
December 31, 1962	$13,790,261	$7,325,661	$6,464,600
December 31, 1961	$13,076,394	$6,900,006	$6,176,388
December 31, 1960	$12,452,972	$6,569,686	$5,883,286

16. The Board of Directors of Central arbitrarily, and in an abuse of their discretion, refused to declare dividends on the Central preferred stock for the years 1960, 1961, 1962, and 1963.

17. In December, 1955, the St. Louis—San Francisco Railway Company, a Missouri Corporation, (hereinafter referred to as "Frisco") filed with the Interstate Commerce Commission (hereinafter usually referred to as "ICC") an application for authority to control Central through purchase of Central's capital stock. In 1960, the ICC denied Frisco's application for authority to control Central and ordered Frisco to divest itself of the shares of Central owned by Frisco or to place them in a trust under the terms of which the shares were to be sold to any railroad company offering to buy them on terms and conditions approved by the ICC. By Agreement dated August 11, 1960, between Frisco and Southern, it was provided that, subject to approval by the ICC, Southern would buy Frisco's 249,987 shares of Central common stock and 111,187 shares of Central preferred stock. The price to be paid by Southern was a total of $22,655,000, representing $13,571,800 for the common stock and $9,083,200 for the preferred stock.

18. Pursuant to the Agreement dated August 11, 1960, Southern and Frisco filed a joint petition, under date of September 2, 1960, to the ICC, asking approval of the control of Central by Southern through purchase of the shares of Central stock owned by Frisco.

19. In the proceedings before the ICC, whereby Frisco had unsuccessfully sought control of Central, the ICC had issued an order stating that it would not permit control of Central to be obtained unless the proposed controlling corporation offered to buy the minority shares of Central at a price equal to the average price paid for said shares by Frisco. During the course of the ICC's consideration of Southern's application for control of Central, Southern offered to purchase the minority shares of Central stock at a price of $54.29 per common share and $81.69 per preferred share.

20. For the year 1959, Central's Board of Directors declared a 5% preferred stock dividend. Thereafter, during the pendency of Southern's application before the ICC for control of Central, the Board of Directors of Central refused to declare the $5 per share annual dividend on the Central preferred stock. The refusal was based on the conclusion of the Board that the ICC would grant Southern's application. The Board realized that payment of such dividends on the Central preferred stock, during the period prior to control by Southern, was against Southern's best interests; under the terms of the Agreement of August 11, 1960, such dividends on the Frisco-owned, trusteed, preferred stock would go to third persons; and that such dividends would be payable to Frisco, and such dividends on the minority-owned preferred stock would effectively increase, by the amount of the dividends, the purchase price to be paid by Southern; said purchase price was a fixed amount, without provision for variation as to such interim preferred dividends.

21. Central's Board supported their refusal to declare dividends by causing Central to report smaller net income.

Railroads are able to control reportable net income by varying the amounts chargeable against income for (a) Maintenance of Way and Structures and (b) Maintenance of Equipment. Except for essential repairs, railroads tend to reduce maintenance costs when gross revenues fall, so as to maintain a more even net income and keep up dividend payments to stockholders.

22. Central's expenditures for maintenance in the five years prior to the Agreement of August 11, 1960 were as follows:

Year	Maintenance of Way & Structures	Maintenance of Equipment	Total
1955	$6,975,270	$7,173,957	$14,149,227
1956	$6,999,223	$7,438,440	$14,437,663
1957	$6,590,087	$7,555,146	$14,545,233
1958	$6,697,873	$7,864,785	$14,562,658
1959	$6,469,727	$8,597,707	$15,067,434

23. In 1960, Central's gross operating revenues decreased from $44,156,250 in 1959 to $41,798,285 in 1960. Central's Board kept maintenance expenditures at a total of $15,000,853 ($6,468,517 for Way and Structures and $8,632,336 for Equipment.)

24. In 1961, Central's gross operating revenues increased to $41,985,555 and maintenance spending decreased to $13,936,946 ($6,603,911 for Way and Structures and $7,333,035 for Equipment).

25. In 1962, Central's gross operating revenues increased $1,596,971 to $43,582,526 and maintenance expenditures increased $2,118,545 to $16,055,491 ($6,603,911 for Way and Structures and $7,333,035 for Equipment).

26. As a result of these actions by Central and its Board, the reported net income for 1960 through 1962 was substantially reduced. By so doing, Central and its Board

reduced the pressure by minority preferred stockholders for payment of preferred dividends.

27. Central's reported net income and consolidated net income for 1960 through 1962 were as follows:

Year	Net Income	Consolidated Net Income
1960	$354,088	$ 809,774
1961	$486,336	1,176,348
1962	$396,382	844,709

28. Plaintiffs do not presently know the equity of Central in the earnings of its subsidiary companies for 1960 and 1961 but, on information and belief, allege that it was larger than consolidated net income for those years. For 1962, Central reported that its equity in earnings of subsidiary companies equalled $1,156,000, in contrast to reported Consolidated Net Income of $844,709.

29. By 1963, ICC approval of control of Central by Southern had been granted, and the last obstacles to such control had been overcome. Pursuant to the Agreement of August 11, 1960, Southern purchased from Frisco the trusteed shares of Central stock. Southern then offered to purchase the minority-owned shares of stock. By December 31, 1963, Southern owned 96.22% of the combined common and preferred shares of Central.

30. Southern is one of the most efficient railroads in the United States. The proportion of Southern's gross revenues carried through to net railway operating income before federal income taxes amounted to 19.5% in 1963 as compared to 10.1% for all class 1 railroads in 1963, including Southern.

31. Plaintiffs anticipated that Central, under Southern's control, would improve its efficiency and resume payment of preferred dividends.

32. Since Southern's purchase of these shares of Central, and its control of Central and of the Board of Directors of Central, said Board has continued its refusal to declare preferred dividends and redress the injuries done to the preferred stockholders of Central. Southern, which controls the Board of Directors of Central, has interests which conflict against those of Central and the other preferred stockholders of Central:

(a) Southern owns substantially the same percentages of Central preferred and common shares; any loss to Southern from noncumulation of preferred dividends is made up by Southern's ownership of Central common stock;

(b) Southern files a separate fiscal report to its (Southern's) stockholders, not including its subsidiary Central; hence, use of Central's assets to buy equipment or build improvements needed by Southern, enables Southern to make a more favorable report to Southern's stockholders;

(c) Southern files consolidated federal income tax returns and other consolidated tax returns, which make the taxpaying group subject to tax on the subsidiaries' net income, whether or not paid to Southern as dividends; until Southern requires cash dividends from Central, to strengthen Southern's report to Southern's stockholders, Southern has a conflicting interest in causing Central's Available Net Income to be decreased by excessive and unreasonable charges for maintenance and repairs; and

(d) The Railway Labor Executives' Association is appealing in the U.S. Courts from the ICC's decision granting control of Central to Southern, insofar as the decision provides for job protection of Central's employees. Southern is interested in reporting smaller earnings for Central during the pendency of this litigation.

33. Since Southern's purchase of said Central shares, Central and its Board of Directors have continued to cause Central to show smaller Available Net Income be-

cause they are using, and intend to continue to use, Central and its assets to benefit Southern in ways other than by declaration of preferred dividends. In carrying out this determination, Central and its Board of Directors have acted as follows:

(a) Unreasonably increased Central's expeditures for maintenance. Southern took control of Central in mid-1963. In the last quarter of 1963, expenditures for Maintenance of Way and Structures, and of Equipment increased by $2,151,169 over the same period of 1962. In the first half of 1964, such maintenance expenditures increased to $11,854,940 (from $7,883,956 in the first half of 1963), an increase of $3,970,984.

(b) Caused Central to engage in a massive repair and reconstruction program on those segments of Central's railroad lines which directly benefit Southern's traffic;

(c) Caused Central to purchase in excess of twelve million dollars of box cars, railway engines, and other rolling stock, which purchases are far in excess of Central's needs, and are for the purpose of using Central's assets to supply the needs of Southern for rolling stock; and

(d) Caused Central to undertake large scale repair and construction projects of railway yards and other facilities for the purpose of benefiting Southern.

III.

34. These actions by Central and its Board of Directors have caused irreparable injury to the plaintiffs. The preferred dividends on plaintiffs' preferred stock of Central have ceased to accumulate and in addition, plaintiffs have received no preferred dividends from 1960 through 1963. There is no legal remedy to recompense plaintiffs for the loss caused to them by Central and its Board of Directors in failing to declare promptly the preferred dividends payable for the years 1960, 1961, 1962 and 1963. Further,

there is no legal remedy for the delay in declaring said preferred dividends since there is no provision in Central's Charter for interest on the amount of preferred dividends which should have been declared.

35. Plaintiffs have no adequate remedy at law and petition the Court for the following relief in equity:

(a) That defendants be ordered forthwith to declare and pay dividends on the Central preferred stock for the years 1960, 1961, 1962 and 1963, together with interest for the delay in payment of dividends on time.

(b) That plaintiffs be reimbursed for their legal expenses and other costs from the above-created fund.

(c) That defendants be ordered to determine in good faith the matter of the declaration of dividends on the Central preferred stock for the year 1964 and other ensuing years.

Appendix A

CENTRAL OF GEORGIA RAILWAY COMPANY CHARTER

(Seventh Amendment—March 4, 1948)

* * *

5. The holders of the Series "A" and Series "B" Preferred Stock shall be entitled to receive, in preference to the holders of Common Stock, but without preference of either of these two Series of Preferred Stock over the other, out of and to the extent of Available Net Income (as hereinafter defined) for any calendar year, when and as declared by the Board of Directors of the Company, dividends at the rate of five (5%) per cent per annum of the par value thereof from January 1, 1946 less the amount, if any, paid upon consummation of the Plan in respect of the dividend for the year 1946. Dividends on Series "A"

and Series "B" Preferred Stock shall be cumulative, whether or not Available Net Income for the preceding calendar year shall suffice therefor; provided that such accumulated unpaid dividends shall not exceed fifteen (15%) per cent of the par value of Series "A" and Series "B" Preferred Stock, and that there shall be no accumulations to the extent that the effect of an accumulation would be to exceed that percentage.

* * *

13. Available Net Income as used herein for any calendar year means the income of the Company for such year available for fixed charges adjusted by deducting therefrom the fixed charges of the Company for such year, subject to the following:

(a) Income of the Company available for fixed charges and the deductions required to be made therefrom shall be determined in accordance with the Uniform System of Accounts applicable to such year, except that (i) there shall be added thereto such amounts as shall have been charged to operating expenses during such year representing the service value (i.e. the ledger value less the value of salvage, if any) of any non-depreciable road property retired and not replaced, (ii) there shall be deducted therefrom any amounts, not already deducted in accordance with the Uniform System of Accounts, which may be payable or applicable as a sinking fund or sinking funds for any of the Company's First Mortgage Bonds, other than First Mortgage Bonds or Series A, or for any other obligations of the Company for which an unconditional sinking fund or sinking funds, payments into which are not dependent upon the amount of Available Net Income, shall have been provided, (iii) if the Available Net Income for any year be a deficit, the amount of such deficit shall be carried forward and be deducted in determining Available Net Income for the succeeding calendar year or years until such deficit or accumulated or remaining deficits shall be extinguished by

earnings which, in the absence of such deficit or deficits, would be Available Net Income, and (iv) if within ninety (90) days after the close of any calendar year the Board of Directors of the Company by resolution so determine, there shall be deducted all or part of any amount by which two (2%) per cent of the consolidated railway operating revenues of the Company and its wholly owned railroad subsidiaries may exceed that part of the total amount charged during such calendar year to operating expenses by the Company and its wholly owned railroad subsidiaries on account of depreciation and amortization of road property which does not represent amounts paid lessor companies for depreciation on leased road property.

(b) In determining income of the Company for any year any adjustment necessary to correct the income account for any prior year shall be made by appropriate entries and may be made either in the accounts of the current year (unless in violation of the applicable orders, instructions and regulations) or, in the discretion of the Board of Directors and subject to any requisite approval of the Interstate Commerce Commission or other public regulatory body having jurisdiction, may be made in whole or in part in the accounts of any subsequent year or years; and in determining Available Net Income for any year any such entries made in the accounts of that year to adjust the income accounts of prior years, whether cleared through income or profit and loss accounts, shall be treated as items affecting the income accounts for the year in which they are entered on the books, provided, however, that in determining Available Net Income for any year no adjustments necessary to correct the income account of any prior year need be taken into account except to the extent that cash shall have been received or paid or set aside for payment by the Company in respect thereof in such year, or prior to April 15 in the next succeeding year, and provided, further, that if prior to April 15 in any year the Board of Directors shall determine that a substantial liability

exists which would have reduced the Available Net Income for the preceding calendar year or years if such liability had been accrued in such year or years, then all or such portion of such liability as the Board of Directors shall determine may be deducted in arriving at the Available Net Income for the preceding calendar year, in which case such amount so deducted shall not again be deducted in arriving at the Available Net Income for any subsequent year or years.

(c) All computations of Available Net Income shall be made on a calendar year basis and each calendar year shall constitute an income period.

(d) Available Net Income for any year shall be computed in the same manner as if the Company had come into possession on January 1, 1946, of the properties operated by the Trustee of the Debtor's property and had issued on January 1, 1946, all new securities issuable under the Plan.

The Available Net Income for the calendar year 1948 and for each calendar year thereafter shall be determined not later than April 15 of the following calendar year; and Available Net Income for each year shall be applied, to the extent that the same shall suffice therefore, during the succeeding calendar year for the following purposes and in the following order:

(a) To the payment of any amount currently required to be paid into any sinking fund for the Company's First Mortgage Bonds of any series other than Series A, subject to any provision of any indenture supplemental to the First Mortgage creating such series whereby the sinking fund therefor may be subordinated;

(b) To the payment of any amount currently required to be paid as interest on the Company's outstanding General Mortgage Bonds (not including any thereof held in any sinking fund) and of any accumulated interest thereon;

(c) To the payment of an amount currently required to be paid into the sinking fund for First Mortgage Bonds

of Series A pursuant to the requirements of the Company's First Mortgage; and

(d) To the payment of any amount currently required to be paid into the sinking fund for General Mortgage Series A and Series B Bonds pursuant to the requirements of the Company's General Mortgage and any sinking fund for General Mortgage Bonds of any other series, equally and ratably, subject to any provision of the supplemental indenture creating such other series whereby the sinking fund therefor may be subordinated.

Any balance of Available Net Income may be applied to any other proper corporate purposes, including the payment of dividends on any class of stock of the Company, subject to the provisions of Article VII of the General Mortgage, provided, however, that such dividends may be paid out of the income of any calendar year prior to the close of such calendar year if, but only if, prior to the declaration of such dividends, the Board of Directors of the Company shall by resolution have determined that the Available Net Income for such year applicable to the payments specified under (a), (b), (c) and (d) above will be more than sufficient to meet the requirements thereof and such amounts shall have been deposited in trust for the purposes specified in said subsections.

Answer, Filed November 10, 1966

ANSWER

Now come the defendants Central of Georgia Railway Company, D. W. Brosnan and R. E. Franklin, by their undersigned attorneys, and answer the complaint filed herein as follows:

1. Defendants admit the allegations of paragraph 1, except that defendants (a) deny the amount in controversy exceeds the sum of Ten Thousand Dollars, and (b) are

without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations pertaining to the citizenship of plaintiffs.

2. Answering the allegations of paragraph 2, defendants admit that D. W. Brosnan is Chairman of the Board of Directors of Central of Georgia Railway Company and a member of the Executive Committee of said Board, and that he is President of Southern Railway Company, a corporation organized under the laws of the Commonwealth of Virginia. Except to the extent admitted, the allegations of paragraph 2 are denied. Southern Railway Company presently owns, directly or indirectly, 99.35 percent of the Common Stock and 98.51 percent of the Preferred Stock of Central of Georgia Railway Company.

3. Defendants deny the allegations of paragraph 3 and show further that at the time the complaint herein was filed, E. M. Tolleson was no longer a member of the Board of Directors or a member of the Executive Committee of said Board of defendant Central of Georgia Railway Company. At the time the complaint herein was filed, E. M. Tolleson had retired. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations pertaining to the residence or place of business of E. M. Tolleson. For further answer, defendants show that R. E. Franklin resigned from the Board of Directors of Central of Georgia Railway Company effective January 1, 1966, and since that date has had no connection whatever with said company.

4. Defendants admit the allegations of paragraph 4 except with respect to James M. Berry who is retired and Harrell L. Perkins who is deceased.

5. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 5 except that defendants deny that plaintiff Oscar L. Altman owned stock in his name on the dates alleged.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 6 except that defendants deny that plaintiff Victor A. Altman owned stock in his name on the dates alleged.

7. Defendants deny the allegations of paragraph 7 and show that, exclusive of Southern Railway Company and plaintiff Victor A. Altman, there are presently only 42 separate holders of record, two are named as defendants in this action or are officers of or are employed by Central of Georgia Railway Company; and that those remaining shareholders who may be in agreement with plaintiffs' suit, if any, are not so numerous that joinder of all of them is impracticable.

8. Answering the allegations of paragraph 8, defendants show that the holders of Preferred Stock of Central of Georgia Railway Company are entitled to receive dividends "in preference to the holders of Common Stock but without preference of either of these two series of Preferred Stock over the other, out of and to the extent of Available Net Income (as hereinafter defined) for any calendar year, when and as declared by the Board of Directors of the Company." Exhibit "A" attached to the complaint and referred to in paragraph 8 thereof sets out with substantial accuracy certain selected portions of the charter of Central of Georgia Railway Company. Except to the extent herein admitted, the allegations of paragraph 8 are denied.

9. Answering the allegations of paragraph 9, during the years 1960 through 1963 inclusive there were issued and outstanding 170,394 shares of Preferred Stock of Central of Georgia Railway Company. A $5.00 per share dividend for one year on said stock would equal $851,970.00. Except to the extent herein admitted, the allegations of paragraph 9 are denied.

10. Answering the allegations of paragraph 10, the last dividend paid on the Preferred Stock of Central of Georgia Railway Company was a dividend of $5.00 per share payable quarterly in 1960 with respect to the Available Net Income for the year 1959. Except as to the extent herein admitted, the allegations of paragraph 10 are denied.

11. Answering the allegations of paragraph 11, defendants admit that defendant Brosnan wrote in October 1963 that the Board of Directors of Central of Georgia Railway Company had declined to pay dividends on the Preferred Stock. Defendants further admit that no dividends have been declared or paid on Central's Preferred Stock in 1964. Except to the extent herein admitted, the allegations of paragraph 11 are denied.

12. Defendants deny the allegations of paragraph 12. For further answer defendants show that under the charter of defendant Central of Georgia Railway Company there has accumulated a total of 15 percent, or a dividend of $15.00, per share, on the Preferred Stock of said company with respect to Available Net Income for the years 1960, 1961 and 1962. Defendants admit that with respect to earnings for the year 1963 no dividend will accumulate because the maximum of 15 percent had accumulated prior to the year 1963. Defendants also admit that there is no provision for the payment of interest on unpaid dividends.

13. Defendants deny the allegations of paragraph 13.

14. Answering the allegations of paragraph 14, defendants admit that the allegations thereof are substantially correct insofar as they relate to the years 1960 through 1963, inclusive, except that consolidated Net Income for 1963 is not available. Except to the extent admitted, the allegations of paragraph 14 are denied.

15. Defendants deny the allegations of paragraph 15 except that defendants admit the substantial accuracy of the figures alleged therein.

16. Defendants deny the allegations of paragraph 16.

17. Defendants admit that the allegations of paragraph 17 are substantially accurate.

18. Defendants admit that the allegations of paragraph 18 are substantially accurate, except they show that Southern Railway Company and the St. Louis-San Francisco Railway Company did not file a joint petition and that the petition of Southern Railway Company was filed December 15, 1960.

19. Defendants admit that the allegations in paragraph 19 are substantially correct.

20. Defendants deny the allegations of paragraph 20.

21. Defendants deny the allegations of paragraph 21.

22. Defendants admit that the allegations in paragraph 22 are substantially correct.

23. Defendants admit the allegations in paragraph 23, except in railroad accounting terminology "Gross Operating Revenues" are referred to as "Total Railway Operating Revenues."

24. Defendants admit the allegations of paragraph 24 except that "Gross Operating Revenues" are referred to in railroad accounting terminology as "Total Railway Operating Revenues."

25. Defendants deny the accuracy of the figures shown in parentheses in paragraph 25 and admit the remaining allegations of said paragraph 25, with the exception of terminology.

26. Defendants deny the allegations of paragraph 26.

27. Defendants admit that the allegations of paragraph 27 are substantially correct.

28. Defendants admit the allegations of paragraph 28.

29. Defendants admit the allegations of paragraph 29.

30. Defendants admit the substantial accuracy of paragraph 30.

31. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 31.

32. Defendants deny the allegations of paragraph 32.

33. Defendants deny the allegations of paragraph 33 except that defendants admit the substantial accuracy of the figures alleged therein.

34. Defendants deny the allegations in paragraph 34.

35. Paragraph 35 contains plaintiffs' prayer for relief and no answer is required.

36. For further answer, defendants show that a preferred stockholder of the Central of Georgia Railway Company is not entitled to a dividend on Preferred Stock unless and until declared by the Board of Directors of said company.

WHEREFORE, defendants pray that the relief demanded in the complaint be denied and that defendants go hence without day and recover their costs incurred.

Motion To Stay Action. Filed December 10, 1963

MOTION TO STAY ACTION

Defendant Central of Georgia Railway Company, by its attorneys, hereby moves this Court to stay the above-entitled action pending a determination by the Interstate Commerce Commission on the application by Central to merge with the Georgia, Southern, & Florida Railway Company, the Savannah & Atlanta Railway Company and the Wrightsville & Tannille Railroad Company. ICC Finance Docket No 25979. The grounds upon which this action is based are set forth in the accompanying memorandum of points and authorities.

Transcript of Proceedings, March 4, 1970 (pp. 20, 21)

THE COURT: This Court is of the opinion that this action, brought by two stockholders of preferred stock of Central of Georgia Railroad, seeking to obtain dividends which they claim have been wrongfully withheld during periods since 1960, constitutes a claim which is not within the jurisdiction of the Interstate Commerce Commission.

This suit was filed in 1965. It has been pending in this Court ever since. The application for the merger was filed with the Interstate Commerce Commission almost five years later, on December 9, 1969.

Whereas the Schwabacher case and other cases referred to by the defendant indicate that the Interstate Commerce Commission has primary jurisdiction of claims in merger proceedings, there made by dissenting shareholders, nevertheless in the Opinion of this Court those decisions do not reach the proposition which is involved here, that is to say, whether or not these shareholders should be paid dividends for the period that they claim.

If they succeed, these are debts that are owed to the shareholders rather than claims of dissenting shareholders as to the valuation of their shares.

Order of Interstate Commerce Commission Permitting Intervention. Filed February 10, 1970

ORDER

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 25979 *

CENTRAL OF GEORGIA RAILWAY CO., GEORGIA & FLORIDA RAILWAY CO., SAVANNAH & ATLANTA RAILWAY CO. and WRIGHTSVILLE & TENNILLE RAILROAD CO.—CONSOLIDATION— CENTRAL OF GEORGIA RAILROAD CO.

IN THE MATTER OF PETITION FOR LEAVE TO INTERVENE

PRESENT: Kenneth H. Tuggle, Commissioner to whom the matters which are the subject of this order have been referred for action thereon.

Upon consideration of the record in the above-entitled proceedings; the petition for leave to intervene filed by Victor A. Altman on January 9, 1970; the reply filed by applicants on January 28, 1970; and good cause appearing for intervention:

It is ordered, That the petitioner be, and he is hereby, permitted to intervene and be treated as a party to these proceedings; *provided, however,* that the permission to intervene herein granted shall not be construed to allow intervenor to unduly broaden the issues raised in these proceedings.

Dated at Washington, D. C., this 10th day of February, 1970.

By the Commission, Commissioner Tuggle.

H. NEIL GARSON,
Secretary.

(SEAL)

* This order also embraces Finance Docket No. 25980, Central of Georgia Railroad Co.—Trackage Rights, Etc., Finance Docket No. 25981, Southern Railway Co.—Control—Central of Georgia Railroad Co., and Finance Docket No. 26006, Central of Georgia Railroad Co., Stock and Assumption of Obligation and Liability.

Order Denying Motion To Stay and Certifying to Court of Appeals Pursuant to 28 U.S.C. § 1292(b). Filed March 19, 1970

ORDER

This matter having come before the Court, concerning the above-entitled action, on Motion to Stay Action, filed by attorneys for Defendant Central of Georgia Railway Company, and on consideration of the memoranda and oral arguments concerning this motion, it is this 19th day of March, 1970,

ORDERED that the motion be and the same is hereby denied, and it is further

CERTIFIED to the Court of Appeals, pursuant to the provisions of 28 U.S.C. § 1292(b), that the present order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

(Signed) JOSEPH C. WADDY
Waddy, J.
United States District Judge

BRIEF FOR CENTRAL OF GEORGIA RAILWAY COMPANY
Appellant

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24442

OSCAR L. ALTMAN, *et al., Appellees*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CHARLES A. HORSKY
JAMES HAMILTON
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24442

OSCAR L. ALTMAN, *et al.*, *Appellees*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR CENTRAL OF GEORGIA RAILWAY COMPANY Appellant

ISSUE PRESENTED FOR REVIEW

Whether an action seeking an order requiring a railroad to pay preferred dividends, which it is alleged the directors should have declared, should be stayed when that railroad and others apply to the Interstate Commerce Commission for approval of a plan for consolidation, one provision of which would retire the preferred shares in return for a cash payment in such

amount as the Commission may determine to be fair and reasonable.

* * * * *

This action has been before this Court on two prior occasions. Issues on jurisdiction, *forum non conveniens* and proper parties were decided in *Altman* v. *Central of Georgia Railway Co.*, No. 19824, decided May 19, 1966, and reported at 124 App. D.C. 155, 363 F.2d 284. Plaintiffs' attempt to appeal the denial of a motion for summary judgment was dismissed in No. 23332 on November 12, 1969 (not reported).

REFERENCES TO RULINGS

The basis of the order of the District Court is contained in the court's oral statement at the close of the hearing below, set forth at page 23 of the Joint Appendix.

STATEMENT OF THE CASE

This is an appeal from an order of the District Court denying a stay of its proceedings. Central of Georgia Railway Company (Central, hereafter) sought the stay on the ground that an application for approval of a plan of merger filed with the Interstate Commerce Commission had invoked the primary and exclusive jurisdiction of the Commission over the subject matter of this action—the alleged right of preferred shareholders of Central to certain additional dividends—and that if the Commission exercised its jurisdiction and the merger were consummated, the case would become moot.

The order entered on March 19, 1970, while denying the relief requested, certified pursuant to 28 U.S.C. Sec. 1292(b) that the order involved controlling ques-

tions of law on which there is ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. On June 12, 1970, this Court granted a petition to allow this appeal.

The context in which the issue on this appeal arises can be briefly stated:

Appellees, who claim ownership of certain shares of the preferred stock of Central, filed this class action against Central and its directors in 1965 (App. pp. 3-17). Their complaint seeks to require the payment of dividends on Central's preferred stock for each year since 1960, save for one year in which a preferred dividend was paid. Two bases are alleged for the relief sought: (1) that during the years in question the directors of Central misconstrued Central's corporate charter provisions relating to the calculation of "Available Net Income"—the only fund from which under the charter preferred dividends may be paid—and that, properly construed, there would have been "Available Net Income" for preferred dividends; and (2) that the directors of Central abused their discretion by spending such excessive amounts for the purchase, maintenance and upgrading of Central's properties that "Available Net Income" was so reduced as to make preferred dividends impossible. The answer filed by defendants denied the material allegations of the complaint (App. pp. 17-22).

Trial has not yet been had. Preliminary proceedings prior to answer,[1] extensive controversy regard-

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[1] See Altman v. Central of Georgia Ry. Co., 254 F. Supp. 167 (1965), 124 App. D.C. 155, 363 F.2d 284 (1966), *cert. denied*, 385 U.S. 920 (1966).

ing elaborate interrogatories filed by plaintiff, and an unsuccessful attempt by plaintiff to secure partial summary judgment, followed by an abortive attempt to appeal to this Court,[2] have intervened.

On December 9, 1969, Central joined with three other Southern Railway Company subsidiary carriers and with Southern in an application to the Interstate Commerce Commission for authority to consolidate the four companies into a new carrier corporation (to be named Central of Georgia *Railroad* Company) to be wholly owned by Southern. Finance Dockets Nos. 25979, 25980, 25981, 26006, *Central of Georgia Railway Company, Georgia & Florida Railway Company, Savannah & Atlanta Railway Company, and Wrightsville & Tennille Railroad Company—Consolidation—Central of Georgia Railroad Company.* The joint application, a copy of which has been lodged with the Clerk, proposes, *inter alia,* that minority stockholders such as appellees[3] be paid the fair and reasonable value of their shares in cash—$84 per share, in the case of preferred stock of Central. The purpose of this proposed intra-system consolidation, as the joint application explains in detail, is the achieving of greater efficiency and economy of operation through corporate simplification.

Appellee Victor Altman, as a preferred shareholder, was served with notice of the proposal, filed and had

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[2] See Altman v. Central of Georgia Ry. Co., No. 23332, *appeal dismissed* November 12, 1969.

[3] The minority preferred shareholders of Central own 2,723 shares, constituting 1.6% of the preferred shares outstanding. Appellee Victor Altman is the record owner of 100 shares. See Finance Docket No. 25979, pp. 17-18.

granted a petition to intervene, and has participated in the hearing that the Commission has ordered.[4]

The stay which the court below denied was sought by Central shortly after the filing with the Commission of the joint application (App. p. 22). In denying the stay, the court below stated as its opinion that appellees' claim "is not within the jurisdiction of the Interstate Commerce Commission" because, if appellees succeed in their action, "these are debts that are owed to the shareholders rather than claims of dissenting shareholders as to the valuation of their shares" (App. p. 23).

ARGUMENT

Reduced to its simplest terms, the issue in this case is whether, when an application for approval of a merger properly invokes the jurisdiction of the Interstate Commerce Commission to determine whether the proposal in the merger agreement to retire minority preferred shares, including those of appellees, for a cash payment of $84 (or such other figure as the Commission may fix) is fair and reasonable, appellees may nonethless pursue an action to recover preferred dividends allegedly improperly withheld. We think it clear that the subject matter of appellees' action has been transferred to the jurisdiction of the Interstate Commerce Commission, which is both primary and

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[4] On April 27, 1970, the Commission ordered a hearing on the merger plan under its modified procedure. Applicants filed their Statement of Facts and Argument and supporting verified statements in June 1, 1970. Appellee Altman filed his verified Statement of Facts and Argument on June 27, 1970, and, pursuant to an invitation from the Commission to elaborate his claim for back dividends, filed a further verified Statement of Facts and Argument on July 13, 1970. Copies of these documents have been lodged with the Clerk. Applicants filed a reply on July 27, 1970. This case is now submitted, but the Commission has not yet ruled.

exclusive. Moreover, if the Commission approves the plan of merger and it is then consummated, the issues in this action will become moot.

Once the jurisdiction of the Commission has been invoked, as it now has been, the merit of appellees' claim—and we believe it has none—is a factor to be considered, along with other factors, in determining whether the amount proposed to be paid to the minority preferred stockholders by the terms of the merger plan (or such other figure as the Commission may fix) is "just and reasonable." *That* determination must be made by the Commission.

This, we believe, is the teaching of the Supreme Court in *Schwabacher* v. *United States,* 334 U.S. 182 (1948). That case involved an action by dissenting minority stockholders of the Pere Marquette Railway Company to set aside an ICC order authorizing the merger of the Pere Marquette with the Chespeake & Ohio Railway Company. The Commission had found the merger to be in the public interest, and had found "just and reasonable" the terms for carrying it out, including the amount to be paid for the shares held by the minority stockholders. However, the Commission had expressly declined to pass on the claims made by the minority stockholders of the Pere Marquette that, under the Pere Marquette charter and Michigan law, they were entitled to an additional amount on the theory that the merger amounted to a dissolution of the Pere Marquette. The Commission said (see 334 U.S. at p. 188):

> "This does not mean that the Cheapeake & Ohio and the Pere Marquette do not remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts."

As the Supreme Court characterized the Commission decision (*id.* at p. 189):

> "The Commission thus left in a state of suspense, subject to further litigation or negotiation, these claims concerning the extent of the capital obligations of a constituent company, after examining them sufficiently to determine only that, however settled, they did not involve enough to affect the solvency of the new company or jeopardize its operations."

This, the Court held, was error. The Court said (*id.* at pp. 197-198):

> "It appears to us inconsistent with the Interstate Commerce Act for the Commission to leave claims growing out of the capital structure of one of the constituent companies to be added to the obligations of the surviving carrier, contingent upon the decision of some other tribunal or agreement of the parties themselves. . . . We think the Commission was in error in assuming that it did not have, or was at liberty to renounce or delegate, power finally to settle the amount of capital liabilities of the new company and the proportion or amount thereof which each class of stockholders should receive on account of its contributions to the new entity."

And at a later point in its opinion, referring to the rights asserted by the dissenting stockholders under the charter and state law, the Court added (*id.* at p. 201):

> "Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable. In making that determination, those rights are to be considered to the extent that they may affect intrinsic or market values."

The application of the *Schwabacher* case to the present issue is apparent. The additional dividends that appellees claim are indistinguishable from the liquidation claims made by the minority stockholders in *Schwabacher*. Both are "claims growing out of the capital structure," as the Supreme Court characterized the claims in *Schwabacher*. Indeed, the claims of appellees here are even more clearly matters for the Commission, for here the Commission must decided what is "just and reasonable" not only for the minority preferred shareholders, but also for the minority common stockholders.[5] Were further dividends to be found due to preferred shareholders, allocation of the value of the stockholders' equity in Central would necessarily be affected, and hence the amount that is "just and reasonable" for holders of common stock of Central would be *pro tanto* decreased. Since the Commission cannot avoid the issue of what is "just and reasonable" for the holders of common shares, appellees' claim cannot be left "in a state of suspense, subject to further litigation," as the Commission sought to do with the claims of the minority stockholders in *Schwabacher* (see 334 U.S. at p. 189). If the Commission is to discharge its statutory responsibility, it must decided what increment, if any, is to be included in the fair value of the preferred shares by reason of appellees' claim.[6]

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[5] Minority common stock outstanding, which is to be retired for cash under the merger plan, is 2,271 shares, representing 0.7% of the outstanding common stock of Central. Finance Docket No. 25979, Application, pp. 17-18.

[6] That appellees' court action was pending does not, of course, limit the jurisdiction of the Commission. *Cf.* CMAX v. Hall, 300 F.2d 265 (9th Cir. 1962).

The same answer is mandated by practical considerations. Once the merger is approved and consummated, the preferred shareholders cease to be such, since Central of Georgia Railway Company—appellant here—will no longer exist, and the former preferred shareholders will have only the right within five years—the time allowed in the proposed plan—to exchange their certificates for the amounts due them under the merger plan. At that point appellee Altman, like all other preferred shareholders, will have had tendered to him the fair value of his stock, including whatever increment of value may be added to it by reason of its alleged right to further dividends improperly withheld, and this case will be moot.

Since *Schwabacher,* issues similar to the present one have understandably been infrequent. Reference may, however, be made to *Sable* v. *Watson-Wilson Transportation System, Inc.,* 285 F. Supp. 351 (W.D. Mo. 1968). In that case, minority stockholders sought to have the court act upon issues pending in a merger proceeding before the Interstate Commerce Commission, alleging that the value ascribed to their stock in the proposed merger plan had been improperly reduced by the directors in violation of their fiduciary duties. The defendant's motion for a stay of the proceedings pending the action of the Commission was granted. The court first acknowledged that in *Schwabacher* the Supreme Court had held that the jurisdiction of the Commission (285 F. Supp. at p. 353)—

> "includes not only the power but the duty to adjudicate the claims of dissenting stockholders; the duty to protect the minority stockholders' interests in the merger by a determination if the terms are fair as to the minority stockholders; and the power

> to require the dissenting stockholders to accept for their existing interest its economic equivalent of stock in the merged company."

The court concluded (*id.* at p. 354):

> "It is admitted in this case that the agency has the exclusive jurisdiction to fix the value of plaintiff's stock, if the merger is approved. Many of the issues raised in this case bear directly on that question. In addition, some of the questions raised by this complaint, such as the fair division of receipts from interline freight and proper or improper 'write-off' of assets of a common carrier are particularly within the specialized field and expertise of the agency. *The Court feels that the doctrine of primary jurisdiction should be applied under these facts.*" (Emphasis added.)

A further word is warranted on the theory or assumption upon which the court below appears to have rested its decision—that appellees' claims are "debts that are owed to the shareholders rather than claims of dissenting shareholders as to valuation of their shares" (App. p. 23). We have already noted above that, under *Schwabacher* and *Sable,* this is quite erroneous; alleged rights of dissenting shareholders under the corporate charter or under state law are intrinsically and necessarily related to the stock, and, to the extent they may be valid, such claims are "to be considered [by the Commission] to the extent that they may affect intrinsic or market values" (334 U.S. at p. 201).

Moreover, it is unquestionable that both in Georgia, where Central is incorporated, and generally, a claim for a dividend not yet declared is not a claim for a debt. Stockholders of a corporation do not become its creditors until a dividend is declared by the directors or

ordered by a court. Indeed, the right to claim dividends follows the stock; the particular individual who happens to hold stock at the time the dividend on it would have been due, but who later disposes of the stock, does not have a personal claim in debt against the corporation. See, *e.g., Easterly* v. *Southern G-F Co.,* 181 Ga. 405, 182 S.E. 508 (1935); *Board of Trustees* v. *Barrow County Cotton Mills,* 39 Ga. App. 261, 146 S.E. 637 (1929); *Mann* v. *Anderson,* 106 Ga. 818, 32 S.E. 870 (1899); *Polish American Pub. Co.* v. *Wojcik,* 280 Mich. 466, 273 N.W. 771 (1937); *Cyrowski* v. *Wojcik,* 280 Mich. 476, 273 N.W. 791 (1937); Fletcher, *Cyclopedia of Corporations,* Sec. 5321 (1958 Rev. Vol.).

CONCLUSION

There is no reason to fear that by thus recognizing the exclusive jurisdiction of the Commission, the Court will prevent appellees from receiving as much as is due them. The Supreme Court in *Schwabacher* counseled the Commission in clear terms regarding the interests of minority stockholders (334 U.S. at p. 201):

> "In determining whether each class of stockholder receives an equivalent of what it turns in, the Commission, of course, is under a duty to see that minority interests are protected, especially when there is an absence of arm's length bargaining or the terms of the merger have been imposed by management interests adverse to any class of stockholders."

We submit, therefore, that the order of the District Court should be reversed, and the case remanded to the District Court with instructions to grant a stay of the proceedings until the Commission has determined whether the proposed plan of merger, with such

modifications as the Commission may order, is to be approved.

Respectfully submitted,

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Attorneys for Appellant

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BRIEF FOR OSCAR L. ALTMAN, ET AL.,

Appellees

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 24442

OSCAR L. ALTMAN, ET AL., Appellees

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, Appellant

Appeal from the United States District Court
for the District of Columbia

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

OSCAR L. ALTMAN, et al., Appellees v. CENTRAL OF GEORGIA RAILWAY COMPANY, Appellant	NO. 24442

BRIEF FOR OSCAR L. ALTMAN, ET AL., Appellees

ISSUE PRESENTED FOR REVIEW

In a 1965 equitable class suit brought by preferred stockholders against a railroad (Central) and two directors, seeking dividends beginning with year 1960, is the District Court ousted from jurisdiction because (Central) joined in a 1970 I.C.C. Finance Docket wherein it sought approval to retire its preferred stock?

* * * * *

REFERENCES TO RULINGS

This suit has been before this Court twice: 124 U.S. App. D.C. 155, 363 F.2d 284 (May 19, 1966); and unreported (Nov. 12, 1969, No. 23332).

STATEMENT OF THE CASE

In 1965, plaintiff preferred stockholders ("Minority Stockholders") filed a class suit in equity, seeking dividends for the years 1960 on, including future years. Central (and the two individual defendant Directors), contested jurisdiction of the Court on two grounds, forum non conveniens and because the suit allegedly involved Central's internal affairs. Central won below, but this Court reversed. No contention was made by Central, or the Minority Stockholders, that the I.C.C. had exclusive and plenary jurisdiction, and this Court found no such question in the suit on its own motion. In its opinion affirming jurisdiction, this Court stated:

> ". . .the nature of the issue raised by the complaint is important. The problem here concerns the financial management of Central under its charter. The operation of the railroad in other aspects is not importantly involved." 124 U.S. App. D.C. at 156-7, 363 F.2d at 285-6.

Certiorari was denied, 385 U.S. 920(1966). When the suit returned to the District Court, Central filed its answer. The Minority Stockholders began discovery proceedings, which have not been completed, because of necessary delay in answering interrogatories, contesting the validity of some interrogatories, and intervening motions. No depositions have yet been taken and no documents produced under Rule 34 although some documents were voluntarily produced by Central.

Based on Central's answers to certain interrogatories, and other information, Minority Stockholders moved for partial summary judgment on the ground that the Directors acted arbitrarily in deciding they could declare dividends only from the earnings (Available Net Income) of the preceding year, and that they could not declare dividends from surplus ($16,000,000 - unconsolidated, $27,000,000 - consolidated). The motion was denied, and Minority Stockholders unsuccessfully sought to appeal.

In 1970, almost 5 years after suit began, Central moved to stay this suit, because it had joined in I.C.C. Finance Dockets with Southern Railway Company ("Southern"), beneficial owner of 98.89% and 99.33% of Central preferred and common stock respectively. Central also stated that it would later move to dismiss this suit, after the I.C.C. decided the Finance Dockets, on the ground that the I.C.C. had exclusive and plenary jurisdiction.

THE I.C.C. FINANCE DOCKETS

In the Finance Dockets, filed in December 1969, Southern, Central, and other Southern subsidiary railroads sought approval from the Interstate Commerce Commission of a proposed corporate simplification. As to Central, its preferred and common stock were to be retired and a New Central corporation was to be formed, all of whose stock would be owned by Southern. Although not listed as an objective, the proposal would

eliminate all outside stockholders--the outsider-owned Central preferred stockholders by payment of $84 cash per share. Southern was to be treated differently--its preferred (and common) were to be retired and replaced by New Central stock; outsider-owned stockholders were offered no such opportunity.

Central's price to the outsider-owned preferred stockholders, namely $84 per share, was based on a valuation by John S. Guest, a general partner in Kuhn, Loeb & Co., investment bankers. In reaching the $84 figure, Mr. Guest valued as worthless, or zero, the claims for back dividends involved in this suit. Mr. Guest, in turn, relied on an opinion by Central's Counsel that this suit was without merit.

Plaintiff, Victor A. Altman ("Intervenor") petitioned the I.C.C. on January 9, 1970, for permission to intervene to protect his interests as a preferred stockholder (and also as holder of Central income bonds). The I.C.C. issued an Order permitting the intervention but stating that Intervenor could not "unduly broaden" the issues (App. p.24). Intervenor interpreted the Order to mean that the I.C.C. would not permit a full hearing into the issue of unpaid back dividends involved in this suit.

Other intervenors, as well as this Intervenor, asked for a full hearing by the I.C.C., including the right to call witnesses and to cross-examine witnesses produced by Central. The I.C.C. denied these requests on April 14, 1970, and ordered the Finance Dockets to be set for "modified

procedure". This meant that parties could only submit verified statements and argument. No witnesses could testify, no cross-examination was possible, and no discovery was permitted. The I.C.C. ordered no investigation on its own motion.

On June 29, 1970, Intervenor filed his first Statement of Facts and Arguments in the Finance Dockets. It stated that the Central proposal would injure Intervenor's Central income bonds; denied Central's claim that the I.C.C. had sole jurisdiction of the issues in this suit, and asked for a full hearing should the I.C.C. decide it had sole jurisdiction. Intervenor urged the I.C.C. to hold that no valuation issue was involved; and that Central be required to abide by its Charter and pay $105 per share, plus the accrued dividends (limited by Charter to 3 years or $15), a sum Central was shown to be well able to afford.

Thereafter, I.C.C. Counsel for Central wrote a letter to the I.C.C. stating that he believed that Intervenor had misinterpreted the I.C.C.'s Order by not dealing with the issue of the unpaid dividends involved in this suit. The I.C.C. then wrote to Intervenor and stated that he was permitted to submit information as to the unpaid dividends. It allowed Intervenor approximately 2 weeks to file the second Statement.

On July 10, 1970, Intervenor filed a Second Statement of Facts and Arguments, pointing out that it was not possible to present to the I.C.C.

all relevant facts as to the issues in the suit; that much information had yet to be obtained by cross-examining officials of Central and from documents which were yet to be produced by Central; and that Intervenor was forced to content himself with presenting easily demonstrable facts to prove that the suit had merit and was not worthless. Two principal items were shown. First, that although Central had formally taken the position in this suit that the Directors had no discretion to declare dividends from Central's surplus, Central's own By-Laws disproved this argument. These By-Laws, which were seen for the first time by Intervenor when they were produced at the I.C.C. Finance Dockets, specifically stated that dividends could be declared from surplus. (A motion for partial Summary Judgment is pending in the District Court based on this newly-discovered fact.)

Second, it was shown that Central's own witness, Mr. Guest, had destroyed an argument which Central had urged strenuously and repeatedly in the suit, namely that the Directors could not declare dividends because of the need to conserve cash. Mr. Guest stated that when Central finally declared a dividend in 1969, the dividend was paid to Southern by a credit memorandum and the only cash spent was $10,000 to pay the dividends on the outsider-owned preferred.

Intervenor prayed the I.C.C. to determine: (1) that the suit was not without merit, hence Central's valuation, based on that erroneous assumption,

was invalid; (2) that valuation was not germane, because the Charter provided that preferred shares could be retired at $105, plus $15 for accrued, unpaid dividends or $120 per share; and (3) that execution should be stayed as to Intervenor, and other preferred stockholders who so wished, pending decision in this suit.

Central filed a rebuttal statement and argument on July 27, 1970. The pleadings are considered closed, and the I.C.C. decision is awaited.

LATER DISTRICT COURT PROCEEDINGS

In the District Court, Central meanwhile urged that the 1970 Finance Dockets required the I.C.C. to determine the value of the preferred shares owned by "dissenting" stockholders and that under Schwabacher v. United States, 334 U.S. 182 (1948), the I.C.C. had plenary jurisdiction and the jurisdiction of the District Court was ousted. While presently asking only for a stay, Central stated that after the I.C.C. made its decision, Central would move to dismiss the suit entirely.

The Motion for Stay was denied on March 4, 1970, by District Judge Waddy who stated that the I.C.C. had no jurisdiction over the issue of preferred dividends; that if the District Court declared that preferred dividends should be paid for any year, this declaration would create a debt owed by Central; and that Schwabacher did not control.

The issue was certified to this Court under 28 U.S.C. 1292(b).

ARGUMENT

I. THIS SUIT SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION.

Although the issue technically concerns only a stay, the more important consequence is whether the courts have lost jurisdiction. Central's argument is that this suit concerns Central's "capital structure"; that the I.C.C. has plenary and exclusive jurisdiction of matters relating to a railroad's capital structure; that the Finance Dockets relate to the "valuation" of the preferred shares of "dissenting" stockholders to a merger; and that the I.C.C. determination of the "valuation" of the outsider-owned preferred shares will have to include the valuation of the issue of back dividends. Hence, Central argues that under Schwabacher the courts have lost jurisdiction.

Simply stated, Central's contention is wrong for several reasons. This suit does not concern Central's capital structure, past or present. Rather, this Court decided that the suit concerns Central's "financial management" since 1960. Altman v. Central of Georgia Railway Co., 124 U.S. App. D.C. 155, at 156-7, 363 F.2d 284, at 285-6. No one--including both parties, the District Court and this Court--saw in the case any issue of the I.C.C.'s exclusive and plenary jurisdiction over a railroad's capital structure. There was none present then; there is none present now.

Second, there are no genuine questions involving "valuation" or "dissenting" stockholders. Central has created spurious questions for its

own purposes. There is no genuine valuation question merely because Central refused to abide by its Charter, although financially able to do so. There is no genuine question of determining the rights of "dissenting" stockholders merely because Central chose to give more favorable treatment to its parent, Southern. Schwabacher holds that all Central preferred stockholders should be treated alike, and a "dissenting" stockholder is one who dissents from the I.C.C. decision as to the capital value placed by the I.C.C. on his shares and those of all other stockholders holding his class of stock.

Third, assuming arguendo that the suit involves Central's capital structure, if the courts decided the suit in favor of Minority Stockholders, any impact on Central's capital structure is negligible, less than the effect of a judgment against Central in a negligence suit. With Southern owning 98.89% Central preferred and 99.33% of Central common, it is a matter of indifference whether a preferred share is entitled to $5 more in back dividends. Southern will own all of the stock of New Central anyway. As to Central, preferred dividends for any year mean a cash payment to outsider-owned stockholders of about $10,000, a negligible amount in a corporation its size.

Finally, Schwabacher has never been read to mean that the courts lose jurisdiction of minority stockholders suits for dividends. Central has found no such case nor have we. Looking further, there is authority holding that suits should not be dismissed as to matters outside the primary

and plenary jurisdiction of the I.C.C. Thus the Sable case, primarily relied on by Central, held that since the administrative agency cannot grant the relief sought in the complaint,[1/] it would be improper to order dismissal. Sable v. Watson-Wilson Transportation System, Inc., 285 F. Supp. 351, at 354 (W.D. Mo. 1968). Accord, Watts v. Missouri-Kansas-Texas Railroad Company, 383 F.2d 571 (5th Cir. 1967).

II. EQUITY SHOULD NOT RECOGNIZE A CONTRIVED PSEUDO-SCHWABACHER ISSUE.

Central argued that a Schwabacher issue is present here, because it alleged that the I.C.C. must value the preferred shares of "dissenting" stockholders. Yet, the only reason that the argument has even a tinge of plausibility is because Central concocted a pseudo-Schwabacher issue.

The first step--Central sought to create "dissenting" stockholders by refusing to treat the outsiders equally with the insider (Southern). Southern is to get new shares; outsiders get the "value" of their shares in cash, as valued by Central's witness, Mr. Guest. The second step--having injected a non-existent issue of valuation of "dissenting" shares, Central asserted that the so-called issue ousted the courts from jurisdiction, allegedly following Schwabacher.

1/ "THE COURT: Yes, but would the Interstate Commerce Commission have had jurisdiction in this case to declare the dividend in the first place?
MR. HAMILTON: They would not, but now they have jurisdiction of the case to determine what the value of the stock is.
THE COURT: That does not give them jurisdiction to determine whether or not the directors of the corporation failed to carry out their duties to declare a stock dividend some number of years prior thereto." Official Transcript of Hearing on Motion to Stay, March 4, 1970, pp.4-5 (Emphasis supplied).

Central's position is the contrary of the Schwabacher holding. There, the Commission concluded it had done its full duty "when we make certain that all stockholders of the same class are to be treated alike." 334 U.S., at 188. On the contrary, here Central begins by refusing to treat the preferred stockholders alike. In Schwabacher, which concerned the merger of the C. & O. and the Pere Marquette railroads, holders of 2% of the Pere Marquette preferred dissented from the terms granted to all preferred stockholders of the Pere Marquette. Here, Central required a dissent by outside stockholders because it proposed to discriminate against them.

Central is really purposely confusing a merger proceeding (as in Schwabacher) with another type of finance proceedings, wherein the minority stockholders are offered a price for their shares, as was done several years ago, after Southern had been granted control of Central. Central is trying to confuse the two proceedings because it wants to argue that jurisdiction is ousted under Schwabacher which concerned a merger proceeding.

III. CENTRAL'S PSEUDO-SCHWABACHER ISSUE RESULTS FROM DISREGARD OF ITS CHARTER.

By structuring the I.C.C. Finance Dockets as an offer to pay cash for outsider-owned preferred stock, Central sought to disguise the ultimate fact that the thrust of its proposal is the retirement of all of the preferred. Such retirement is specifically provided for in its Charter, without any valuation questions. The Charter provided that preferred shares

can be retired upon payment of $105 per share, plus accrued unpaid dividends (limited to $15), or a total of $120 per share.

The reasons for Central's disregard of its Charter are obvious. Central hopes to pay $84 per share for the outsider-owned preferred, instead of $120. But more important, by raising a false valuation issue of "dissenting" shares, Central hopes to deny the Minority Stockholders their day in court, and perhaps even eliminate its liability for the costs and expenses arising from their success in obtaining Central's declaration of preferred dividends in 1969.

It is submitted that this Court should be chary of a decision making for potential inconsistency with the I.C.C., since the facts herein do not so require. This Court will place an unreasonable burden on the stockholders if it decided that the courts lost jurisdiction; and the I.C.C. later decided that there is no capital structure issue before it, either because the outside preferred stockholders should be treated the same as Southern or because Central must agree to pay $120 per share, as provided in Central's Charter. The stockholders will have lost their day in court because of erroneous assumptions as to the issue before the I.C.C.

This suit is in equity, and equitable considerations should control. This Court should not dignify Central's efforts to thwart its jurisdiction by giving serious weight to an argument based entirely on a contrived situation entirely of Central's own making. Central clearly merits no equitable relief in its efforts to shop for a forum.

IV. THE SUIT DOES NOT INVOLVE CENTRAL'S CAPITAL STRUCTURE.

The dissent in Schwabacher, written by Associate Justice Frankfurter, and joined in by Chief Justice Vinson and Associate Justice Burton, stated that every operating railroad has "negligence claims" outstanding against it at all times. "Their existence does not interfere with the consummation of a voluntary merger. A reasonable amount of contingent obligations may easily be allowed for." 334 U.S., at 208. This is precisely what Judge Waddy held. If the class suit is won by the Minority Stockholders, the District Court sets aside the contrary decisions of the Directors because they had acted arbitrarily and abused their discretion; the District Court determines on the facts, separately as to each year in issue, whether preferred dividends should have been paid; and if so, orders the declaration and payment of the dividends. Kroese v. General Steel Castings Corporation, 179 F.2d 760 (3rd Cir. 1950). Like the judgment in a negligence claim, the declaration of the dividends creates a debt on the part of Central. 11 Fletcher, Cyclopedia of Corporations (1958 Rev. Vol.) Sec. 5322, p.960.

In this respect, this suit is in the same situation as a lawsuit against Central by a shipper, for damage to goods, or by a person seeking damages from Central for personal injuries. The I.C.C. will not decide such suits either. Nor does it cause a practical problem. Unlike many damage lawsuits, Central can compute the exact amount of out-of-pocket cash (about $10,000 per year) which would be paid to outside preferred stockholders.

The plan presented to the I.C.C. contemplates that amounts payable thereunder can be held for five years. Hence, no delay in the I.C.C. Finance Dockets would result. In any event, there is no question that Central is financially able to pay the preferred dividends and the costs and expenses. Central earned more than $2,000,000 last year, and if unusual charges were disregarded (as was done by its own valuation expert, Mr. Guest) it earned almost $4,000,000 after taxes.

IV. CEDING JURISDICTION WILL DESTROY THE MINORITY STOCKHOLDERS SUIT.

The I.C.C. is a much more difficult forum for the stockholders in a class action suit. The I.C.C. has no comparable discovery provisions which permit the stockholders to obtain full discovery, and compel witnesses to make depositions upon oral examination and to produce documents pursuant to subpoenas duces tecum. Full discovery is essential to proper presentation of a stockholders suit. The relevant facts are almost entirely known only to the railroad and its officers and embodied in its records.

For example, Central contends that extraordinary, emergency-type repairs and rehabilitation were necessary as soon as Southern was granted control of Central. Yet, in Annual Reports to shareholders, issued by Central shortly before the period in question, Central's management pointed out the good condition of Central's physical plant and the tremendous improvement that had been made in the past few years.

In support of the plea to control Central, Southern advised the I.C.C. that: Southern had been granted I.C.C. approval to control other railroads, which had then prospered under Southern's control (Southern Ry. Co.-Control - Central of Georgia Ry. Co., 317 I.C.C. 557, 572(1962); that Southern's control of Central would result in very large annual savings for both Central ($3.8 million per annum) and Southern (Ibid., p.579); and that Southern relied on net earnings on the Central shares to help meet Southern's acquisition costs (Ibid., p. 559). To show that Southern could easily buy the Central stock, Southern caused the I.C.C. to find: "Giving effect to consummation of the transaction and anticipated economies, and assuming a payout to applicant of 50 percent of earnings applicable to the Central's common stock, applicant's 1961 income of $42,720,657, available for fixed charges, would be increased to $46,587,157 and the fixed-charge coverage, after tax adjustments, would be reduced to 3.44." (Ibid., at 559, emphasis supplied).

But in this suit, Central claimed not savings but greater expenses, not earnings but losses.

The answer to the riddle of such discrepancies lies in testimony and documents to be obtained pursuant to deposition and subpoena.

In fact, in the Finance Dockets, the I.C.C. has ruled that it will neither require nor permit oral testimony at all. So there is not only no discovery--there is no cross-examination--a particularly grievous blow in a case where the railroad and its officials control most of the evidence.

The Minority Stockholders are further injured if their suit is ousted from the District Court. In equity, if the stockholders succeed and through their efforts create a fund, they and their counsel are entitled to be paid their expenses and fees from the amount so accumulated. There is no comparable provision in the I.C.C. procedure, and Central has denied that the stockholders would be entitled to any such compensation in the I.C.C. Finance Dockets.

This is a grievous blow, utterly destructive of stockholder efforts at corporate democracy and protection of minority rights.

> "The liberal allowance of counsel fees to the champion of the rights of a group is the dynamic factor giving the necessary impetus and incentive to the volunteer method of representation in class or derivative suits. Otherwise no individual stockholder could afford to begin a suit of such size and difficulty or undertake to resist an unfair settlement." 13 Fletcher, Cyclopedia of Corporations (1961 ed.), Sec. 6045, p.681.

Being ousted from equity would be particularly painful now, because the Minority Stockholders suit was greatly strenghtened in the last few weeks. Information first learned through the I.C.C. proceeding has established two crucial points for Minority Stockholders.

First, there is no merit to Central's argument that it could not pay dividends because of a need to conserve cash. It has always been apparent that Central and Southern, which owns over 99% of Central, are for practical purposes one pocket or economic entity, and debts between them are economically meaningless. However, it is no longer necessary to rely

solely on this theoretical argument. Central's expert witness, Mr. Guest, stated, as to Central's 1969 dividend, that Southern was paid by a credit memorandum between the two corporations; and only $10,000 in cash was paid, to the outsiders. Payment of $10,000 can hardly be called a substantial cash drain to a railroad doing $60,000,000 worth of business a year and earning a net income, as adjusted by Mr. Guest, of approximately $4,000,000 per year after taxes.

Second, new information has demolished an argument vigorously made by Central in the suit. Central had argued vigorously (and, unfortunately, successfully) that Minority Stockholders were not entitled to summary judgment on the ground that the Directors had misinterpreted Central's Charter. Minority Stockholders urged that the Charter permitted Central's Directors to declare dividends out of Central's surplus, and did not restrict Central to the payment of dividends only from the earnings (Available Net Income) of the preceding year, as Central contended. In the Finance Dockets, Central filed its By-Laws, amended in 1964, after Southern was granted formal control of Central. These amended By-Laws, which had never been mentioned by Central in the suit and which were not known to Minority Stockholders, stated that the Directors may declare dividends from Central's "surplus." Art. VI, Sec. 5, By-Laws of Central.

Central, itself, had interpreted its Charter to mean that the Board of Directors could declare dividends from surplus, contrary to the posi-

tion which Central took in the equity suit. In our opinion, had this fact been known to the District Court, the motion for summary judgment would have been granted immediately.

Central is now reduced to the untenable position of claiming that the By-Laws amendment is illegal because it allegedly conflicts with the Charter. This position is unpersuasive in view of the learning and experience of the Central's officers and advisers, as well as those of Southern. Ironically, Central, for this purpose, professes to follow strictly its Charter, while ignoring it for the purpose of avoiding the Charter provisions on retirement of preferred stock.

Since this is an equity proceeding, it is particularly apt for this Court to find persuasive the need to assist stockholders to obtain equitable relief. It has often been stated that corporate democracy is greatly strengthened by the stockholders action and the concomitant rights of stockholders and their counsel to be reimbursed for their expenses and services, if they are successful. It is respectfully suggested that this Court should not destroy the stockholders remedy, and rather, should avoid a contrived issue, such as the Schwabacher issue, which is not squarely placed before it. The Schwabacher issue need not be considered at all in this suit, which is factually far removed from the type of complicated merger proceeding dealt with in Schwabacher.

The I.C.C. itself regards the Finance Dockets as a minor matter, since it has refused to permit oral testimony and cross-examination, the hallmarks of an extended I.C.C. proceeding.

The District Court was correct in deciding that this suit does not involve Central's capital structure but is more akin to a negligence action against Central. This Court should affirm the District Court and its own prior decision in the earlier appeal that the suit involves "financial management" of Central.

CONCLUSION

The ousting of jurisdiction of the District Court would do irreparable damage to the stockholders, and this Court should not grant such drastic relief inasmuch as it is not inevitably compelled to do so. This Court should go further, and decide the courts will retain jurisdiction of this suit and the issue of back, unpaid preferred dividends. The I.C.C. cannot and will not grant the relief sought in the equity suit, and its plenary jurisdiction over the capital structure of railroads will not be adversely affected by a decision upholding equity jurisdiction of suits by minority stockholders for dividends.

Respectfully submitted,

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REPLY BRIEF FOR CENTRAL OF GEORGIA RAILWAY COMPANY

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24442

OSCAR L. ALTMAN, ET AL., *Appellees*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Appellant*

Appeal From the United States District Court for the District of Columbia

CHARLES A. HORSKY
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REPLY BRIEF FOR CENTRAL OF GEORGIA RAILWAY COMPANY

In order that the basic issues on appeal will not become confused, a brief response to appellees' brief is warranted.

1. Appellees' argument (p. 8) that there was no claim made that the Interstate Commerce Commission had primary and exclusive jurisdiction at the time this proceeding was before this Court in 1966 (124 U.S. App. D.C. 155, 363 F.2d 284), and thus that such a claim is not appropriate now, wholly misconceives the issue. The jurisdic-

tion of the ICC attached, and the issue before the Court first arose, in December 1969, when Central, Southern and three other Southern Railway Company carrier subsidiaries filed an application with the Commission for authority to consolidate the four subsidiary companies into a new carrier corporation. The present issue was non-existent in 1966.

2. Appellees' argument (pp. 8-9, 10-14) that the consolidation application, which includes the proposal that appellees, as well as other minority stockholders of Central and the other subsidiary carriers, be paid the fair and reasonable value of their shares in cash, is a device to deprive minority stockholders of their charter rights as to retirement of shares and their alleged rights to back dividends is misdirected. That issue is plainly one for the ICC in evaluating the proposed consolidation—and indeed has already been argued to the Commission by Appellee Victor Altman. There is no reason to believe, and certainly the Court will not assume, that the Commission will not fully protect whatever legal or equitable rights appellees may have.* Indeed, as the Supreme Court has made clear, it is the duty of the Commission, especially in cases such as this where the terms of the consolidation have been proposed by the management, to see that the interests of minority stockholders are protected. *Schwabacher* v. *United States,* 334 U.S. 182, 201 (1948).

3. Nor is there substance to appellees' contention that the procedures of the Commission make impossible a fair resolution of their claims (pp. 5, 14-15). The Commission, mindful of its responsibilities, concluded that the proposed consolidation should be heard under its "modified procedure" (see 49 C.F.R. Secs. 1100.45-1100.54). As

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* In this regard, the Commission also has before it appellees' claim (p. 17) that preferred dividends should have been declared because the Bylaws of Central permitted a dividend payment from surplus. The claim is without substance because the provisions of Central's charter, which must control, do not permit surplus to be used for dividend purposes.

appellees note (p. 5), the Commission, concerned that Appellee Victor Altman might have misunderstood the nature of the procedures, expressly invited him to submit whatever materials he wished in support of his claims, which Appellee Altman proceeded to do. Appellees' suggestion now (p. 5), that the two weeks allowed was inadequate, fails to indicate that Mr. Altman did not request the Commission for additional time. Moreover, it appears that appellees still misapprehend the Commission's modified hearing procedure. They continue to assert (pp. 5, 15) that no witnesses could testify, that no cross-examination would be possible. In fact, Appellee Altman could have presented the testimony, in writing, of any witnesses he wished, and could have cross-examined any witness whose written testimony was presented in support of the proposed consolidation. See 49 C.F.R. 1100.47, 1100.50, 1100.53).* Appellee Altman, having failed to avail himself of the procedures open to him, is in no position to complain.

4. Finally, appellees' argument that *Schwabacher* is inapplicable because the amounts claimed by appellees to be due to minority preferred stockholders are small, and that the claim should be likened to a claim for damages, is not persuasive. This contention is based upon Justice Frankfurter's *dissenting* opinion in *Schwabacher*. These dissenting views, however, did not persuade the majority of the Court. Moreover, it may be noted that appellees' characterization of the record before the Commission is not entirely candid. While Mr. Guest, as appellees recite (pp. 6, 9, 13, 17), stated that the payment by Central

* In support of the consolidation application, applicants submitted written verified statements by Earle F. Bidez, Executive Vice President of Central from 1960 to October 1967 (and an employee of Central continuously for 50 years), who was responsible primarily for the financial and corporate affairs of the company, and by John H. Dewey, since 1962 the General Auditor for all companies in the Southern Railway System, including (since 1963) Central of Georgia. Their testimony in part dealt directly with the issues presented in this lawsuit.

of a preferred dividend in 1969 was accomplished by spending only $10,000 in cash, appellees fail to reveal that this error was corrected in the Verified Rebuttal Statement of John H. Dewey, General Auditor of the entire Southern Railway System, where Mr. Dewey testified that the cash outlay by Central in payment of the 1969 preferred dividend was $851,970—$5 per share for each share outstanding. (A copy of Mr. Dewey's Verified Rebuttal Statement is included in the record of the ICC proceedings that has been lodged with the Clerk.)

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